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Reservation for Rights of Way for Canals and Ditches in Favor of United States Over Former Public Lands of the United States West of the 100th Meridian

BY CHARLES J. BEISE*

On October 2, 1888,[1] Federal funds were appropriated for the survey of western lands for reservoirs, ditches, and canals and all sites were reserved from entry and sale. As a result of the Attorney General's ruling of May 27, 1890, that no land west of the 100th meridian could be entered until such survey was made, Congress determined to repeal that portion of the act,[2] and the surviving portion of the 1888 Act, together with the 1890 Act are codified today as 43 U. S. C. 662, 43 U. S. C. 945. However, it still retains the following provision:

> That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act, west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States.

The provision granting a free canal right of way to Uncle Sam has been extensively utilized in the past and will be increasingly used in the future as the trend of reclamation projects swings from creation of a primary water supply for raw public lands, to development of supplemental waters for existing irrigated areas.[3]

All those lands taken up under any of the public land laws of the United States subsequent to October 2, 1888, are subject to rights of way for ditches or canals constructed by authority of the United States,[4] and since a large proportion of western lands have been entered after that date the reservation accordingly affects a vast acreage west of the 100th meridian in private ownership.

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[1]25 Stat., 505.

[2]Act of August 30, 1890, 26 Stat., 371.

[3]By far the greater number of irrigation projects now investigated by the Bureau of Reclamation for post-war construction concern themselves with "firming up" present hazardous irrigation water supplies. Municipal water demands likewise call for construction work in settled areas. The same is true of hydro-electric developments. Necessarily more and more people will be affected by the exercise of this canal right reserved to the United States.

[4]General Land Office circular of July 25, 1903.

The practitioner's acquaintance with the 1890 Act ordinarily arises when his client presents him with a notice issued by the Bureau of Reclamation which is customarily mailed out by registered mail.[5] There is nothing in the act which limits its exercise to the Bureau of Reclamation and it is possible that the Department of Agriculture, the United States Indian Service, the Grazing Service or the Fish and Wildlife Service might have some projects under which these rights can be claimed.[6] On January 27, 1943, the Assistant Secretary of the Interior approved a decision by the Solicitor of that Department whereby it was held that Indian Reservations created subsequent to October 2, 1888, are subject to this right of way in favor of the United States, and on August 9, 1943, the Assistant Secretary of the Interior approved his Solicitor's opinion that the right of way reserved by the Act of August 30, 1890 (26 Stat. 391) may be used to convey water for domestic purposes to National Parks and Monuments.

The first decisions to arise under the act presented the contention of the landowner that the reservation in favor of the United States was limited to existing canals at the time of the passage of the act and that

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[5]The right of way notice is in the following form:

UNITED STATES DEPARTMENT OF THE INTERIOR
Bureau of Reclamation
.....Irrigation Project

RIGHT OF WAY NOTICE

.....
..... (Date)

.....

It is understood that you have an interest in the land described as ....., Section....., T....., R. ..... M., ..., and that the United States has an interest in the same land because it was entered after October 2, 1888, and is accordingly subject to the following provision of law:

> "That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States." (Act of Aug. 30, 1890, 26 Stat., 391.)

Under the Act of June 17, 1902 (32 Stat., 388), and related enactments the United States is advancing large sums of money for irrigation work in the West, creating much larger values in the lands benefited. Operations have reached the point where such work calls for the use of the right of way reserved to the United States across the land described above. The purpose of this letter is to notify you and any others interested in the land that the United States is about to utilize its right of way across the land. If desired, the project office will be glad to answer questions or give more definite information concerning the location of the proposed ditch or canal, etc.

Very respectfully,
Project Superintendent.

No statutory requirement of mailing or giving this notice exists. It is a matter of policy, however, to mail it.

[6]There are no decisions of courts, of the Land Department, or administrative rulings extant where any other agency other than the Bureau of Reclamation is involved. See also note 40, and last quotation in this article.

prospective or future canals were without the scope of the legislation.[7] The court determined that the legislation was applicable to canals to be constructed by the government in the future, saying:

> As at that time it (United States) had no ditches or canals Congress must and could have referred only to those it intended to construct.

The same decision in the state court[8] gives an excellent summary of the legislative history of the act and apparently there was a substantial difference of opinion in Congress concerning the act at the time of the passage thereof, for Senator Reagan, in speaking of the reservation in patents to be issued in the future, states:

> However much may be said about the House of Representatives in resisting that, they, in my judgment, are entitled to the profound gratitude of the American people for saving to them the little that they have saved in this conference report.

And Senator Dolph said:

> This provision, while it will be of no practical value to anyone, will be a cloud or encumbrance on every man's title who secures a portion of the public domain.

This decision likewise held that the language, "constructed by the authority of the United States," in said act, was applicable without reference to time of construction and that future construction was included within the scope of the act. The ruling in the Green v. Willhite decision was affirmed again in United States v. Ide, Wyoming, 277 Fed. 373, and affirmed in 68 L. Ed. 407, so that today it has been conclusively established that the reservation was made for the benefit of future as well as past construction and includes ditches constructed after patent has issued as well as ditches constructed prior to issuance of patent.

It was next contended in a decision arising in Colorado,[9] in connection with the Uncompahgre Project, that the reservation in the 1890 Act was void because of an indefinite description and this contention also was rejected by the court and the officials of the United States were held to be authorized by the act to determine the route of the canal.[10]

It is a well known fact that where irrigation is practiced extensively, the need for drainage commonly arises, and the United States in connection with an irrigation project which required drainage claimed that the reservation in the 1890 Act was applicable to drainage ditches;[11] the drainage waters collected by the ditches were to be delivered to land privately owned and outside of the boundaries of the federal project.

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[7]Green v. Willhite, Ida. 1906, 160 Fed. 755.
[8]Green v. Willhite, Ida. 1908, 93 P. 971.
[9]U. S. v. Van Horn, 197 Fed. 611, Colo. 1912.
[10]See note 26 as to reasonableness of choice of route.
[11]Griffiths v. Cole, Ida. 264 Fed. 369.

The court determined that drainage ditches were included within the meaning of the act, stating:

> putting it in another way, the proposed disposition of the water is incidental to the construction and maintenance of the Boise Project, and, therefore, the proposed canal is within the scope of the authority conferred by law and for it the Government may occupy rights of way under the Act of August 30, 1890, or exappropriate them by suitable condemnation proceedings.

This conclusion was subsequently affirmed in the United States v. Ide, supra. This liberal construction of the act has been applied by courts to the same type of legislation under other acts dealing with irrigation development and right of way for canals and ditches for private companies.[12]

The statutory right of way reserved by this Act of 1890 in favor of the United States includes the power to straighten, widen or deepen a natural ravine or draw to be used in the conveyance of water,[13] and this decision states that the patentees are estopped by acceptance of patent to question propriety of reservation being inserted therein. This does not preclude the patentee from challenging the necessity of exercising the reserved rights nor the reasonableness of the route chosen for these issues were raised in a decision in Colorado[14] and the court reserved judgment upon these points until the case was finally disposed of on its merits, indicating that the court, at least, considered the objections of the landowner. In the Ide decision, the court stated that the right in favor of the United States must be exercised with ordinary care, otherwise damages can be recovered, and concerning the issue of the necessity of exercising the right, the court heard evidence and determined that the changes sought to be made by the United States were in fact necessary. The mere fact that the court heard evidence upon the issue indicates that the necessity of exercising the right was considered a proper issue.[15]

Where a canal has been constructed by the United States under the authority of this act and the canal is crossed by a railroad or other improvement, such crossings must be made without expense or loss to the United States and any increased cost of maintenance of canals caused thereby must be borne by the person crossing the same.[17]

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[12]See Section 18, Act of March 3, 1891 (26 Stat., 1101, 43 U. S. C. 946) and U. S. v. Big Horn Land and Cattle Company, 17 Fed. 2d 357. holding that the words "canal" or "ditch" were used in an inclusive sense and embrace the entire project. This holding was affirmed in Twin Falls Canal Company v. American Falls Reservoir District No. 2, 59 Fed. 2d 19. Johnson Irrigation Company v. Ivory, 24 P. 2d 1053; U. S. v. Tujungha Co., 48 Fed. 2d 689.

[13]Ide v. U. S., Wyo., 277 Fed. 373, affd. 68 L. Ed. 407.

[14]United States v. Van Horn, Colo. 1912, 197 F. 611.

[15]See notes 30 and 31.

[17]U. S. v. Minidoka and S. W. Railroad Company, 176 Fed. 762, Aff. 59 L. Ed. 200.

It has been the policy of the Bureau of Reclamation to interpret the words "ditches" or "canals" to include any form of conveyance of water, such as siphon, penstock, tunnel, drain, flume or conduit, in addition to open ditches and canals and there is ample justification for this interpretation. Thus in Sefton v. Prentice,[18] the term "conduit" as defined by Webster was accepted by the court to mean, "a general word which applies to any channel or structure by which flowing water can be conducted from one point to another. It includes a ditch, flume, pipe or any kind of aqueduct," and in Colorado,[19] Section 7 of Article 16 of the State Constitution provides, "All persons and corporations shall have the right of way across public, private and corporation lands for the construction of ditches, canals and flumes for the purpose of conveying water * * *," and the court stated, concerning the condemnation of a right of way for a pipe line:

> It does not mention a pipe line but its evident object was to permit a right of way for a conduit through which to convey water for the purposes designated and hence the kind of conduit employed and utilized is of no material moment so far as any question in the case at bar is involved.

And in Washington,[20] Section 16 of Article 1 of the Constitution provided that private property shall not be taken except "for drains, flumes or ditches on or across the land of others for agriculture * * * purposes," and the court decided that the condemnation of a right of way for a private pipeline was a public use and never mentions the fact that a pipeline is being built; apparently it was assumed by all the parties involved to be beyond question. Recently in Colorado[21] in an action to condemn a right of way for a pipeline across a placer claim, the court affirmed its earlier decision in the Lyons case by stating, "the provisions quoted above (Section 7, Article 16, Colorado Constitution) cover pipe lines."

In an article in the Reclamation Era,[22] D. G. Tyree, attorney for the bureau, concludes with the words, "ditches and canals include a tunnel," quoting Webster's definition of a "tunnel" as "a subterraneous passage way, especially one horizontal and open at both ends, as for a railroad, canal, drain, etc.," and the author concludes:

> If a tunnel is correctly defined as a passageway for a canal, it is evident that a canal may be an underground waterway as well

[18] 37 P. 641, Calif. 1894.
[19] Town of Lyons v. City of Longmont, 129 P. 198, 1913.
[20] State v. Superior Court, 266 P. 198.
[21] Pine Martin Mining Company v. Empire Zinc Co., Colo. 1932, 11 P. 221.
[22] 25 Reclamation Era, 246.

as an open ditch and that the right of way for a tunnel is, in fact, right of way for a canal.[23]

The Federal Government has been consistent in a liberal interpretation of the words "ditches" and "canals," not only when it sought to exercise a right existing in favor of the United States, but also when a private party sought to exercise such a right across federal lands. In a decision arising in Colorado[24] the applicant sought a right of way for a pipeline under the Act of March 3, 1891, which granted to private parties rights of way for "ditches, canals or reservoirs," which request was refused and on appeal the decision was reversed, stating:

> From the foregoing authorities, it appears that the words "canal" or "ditch" are used to designate any artificial waterway for irrigation * * * the methods used for conveying water * * * to the lands to be irrigated vary according to topography of the country, character of the soil, climate, permanency of the works, etc. The purpose for which the conduit is constructed and the water conveyed will largely control the descriptive term used and is very material in cases arising before this Department in connection with applications for rights of way under the several laws governing the granting of such easements or licenses. That purpose is irrigation and the fact that the words "reservoir, canal, and lateral" are used in the act does not warrant the assumption that it refers to and only authorizes the use of the rights of way granted for open canals or laterals. On the contrary, it is the evident purpose of Congress to grant the necessary rights of way through public lands for any and all structures essential or necessary to the accomplishment of the purpose of irrigation.

There are numerous states which have statutes granting to the United States a right of way for ditches and canals across state lands and the validity of these statutes have been challenged and sustained.[29] The status of these statutes in Colorado is a bit uncertain.[30]

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[23]The Bureau of Reclamation has interpreted the 1890 Act to cover pipe lines, whether above the ground or buried, including penstocks to power plants.

[24]Fraser Sources Irrigation and Power Company, 43 Decisions Public Lands, 110.

[29]United States v. Fuiler, Ida. 1937, 20 Fed. Supp. 839.

[30]The present statute is found in 4 C. S. A. Chap. 134, Par. 81, and Sec. 29 of Chap. 187 of the 1919 Session Laws, Page 651, repeals the Acts of 1905 and 1917, but does not mention Chap. 207 of the Session Laws of 1909, which act resembles the first statute quoted, save that attached to it was the following language:

> "The right of way is hereby given * * * to the United States to locate, construct and maintain such roads, bridges, canals, ditches, tunnels, pipelines, telephone and transmission lines as may be constructed for the purpose of irrigation by authority of the United States over and through any of the lands which are now or may be the property of the State. All conveyances of State lands hereafter shall contain a reservation of such rights of way,"

and it would therefore seem that the sentence last quoted from the 1909 Act is still in

Although the United States has reserved the right for canals in patents to lands issued by it, it has not exercised its right oppressively and it has made it a policy to pay for all improvements injured or damaged by reason of the construction of the canal. This is not required by the law. The ordinary procedure is to appraise all improvements on the lands and to offer the landowner a sum of money which will compensate him for the damages sustained. Thus it has been held[32] that a contract between employees of the Bureau of Reclamation and a contractor constructing a canal for the bureau whereby the government would assume one-half of the cost of removing an electrical transmission line constructed upon lands subject to the Act of 1890 was not binding upon the United States because the reservation in the patent under the Act of 1890 constituted a conveyance running with the land of which the Power Company had notice and therefore the company could not obtain a right of way superior to that of the United States, and, accordingly, there is no authority for the payment from public funds for a right of way which the United States possesses. This decision was overruled, or at least since issuance thereof, it has been consistently distinguished. Thus, it has been held that a landowner is entitled to damages sustained by him through the exercise of the 1890 canal right by the United States[33] as to any improvements owned by him, but not as to his land.[34]

Compensation has likewise been paid by the United States for any materials removed in the construction of the canal and utilized by the United States in construction of some feature of the project off of the right of way where found;[35] likewise, where a project has been constructed for a mixed purpose, i. e., irrigation and flood control, and a canal was built for irrigation purposes and also levees several hundred feet on each side of the canal, compensation has been paid for the addi-

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effect. No litigation on this point exists in Colorado. Other statutes for cooperation with the United States will be found in Vol. 2 C. S. A. Chap. 134, Sections 68, 69. See also the Ide decision (supra).

[32]7 Comp. Gen. 217. "Reclamation Service—Rights of Way."

[33]Albert W. C. Smith, 47 Public Lands Decisions 158, 1919.

[34]"The rights of the owner of an easement are paramount to the extent of the grant or reservation to those of the owner of the soil. An easement gives to the owner thereof all such rights as are incident or necessary to the reasonable and proper enjoyment of the easement. Where the easement is not specifically defined, the rule is that it need be only such as is reasonably necessary and convenient for the purpose for which it was created. A grant or reservation of an easement in general terms is limited to a use such as is reasonably necessary and convenient, and as little burdensome to the servient estate as possible for the use contemplated. In other words, an unlimited conveyance of an easement is in law a grant of unlimited reasonable use. Under the above principles, it is clear that the United States, under the reservation of the right of way contained in the Act of August 30, 1890, has the right to use such portion of the tract entered as is necessary for the construction, operation, and maintenance of the lateral. The United States is not liable for damages resulting to land 'because it did that which it had a right to do'."

[35]Reclamation decision July 26, 1913.

tional area occupied by the levees and not needed for the canal, the Comptroller General stating:[36]

> The Act of August 30, 1890, does not specify for what purposes the ditches and canals to be constructed by the United States are to be used. The history of the act, however, clearly indicates that it had reference to ditches or canals to convey water for the reclamation of arid lands by irrigation. To the extent therefore that the proposed project is for irrigation purposes alone the title to right of way is already vested in the United States and no payment may be made for the lands required therefor * * * for the additional area required for flood control purposes payment may be made at a reasonable price not in excess of the appraised value of the land involved.[37]

Denver, Air Center of the World

BY STEADHAM ACKER

Following is a summary of remarks made by Mr. Acker, aviation consultant for Denver, at the March 4, 1946, meeting of the Denver Bar Association:

Aviation is transportation. It is past the stage where it is a thrill. It is a business, in its infancy and rapidly developing. It is the newest form of transportation, which means new markets and new thinking. It has romance, which makes it more interesting as a business.

The atomic bomb will make people in large cities think of decentralization and decentralization will make more transportation.

Air transportation will connect Denver with all the rest of the world. In a few months Denver will be less than sixty hours by air from every major city in the world.

How will air transportation help the lawyer? It will help the lawyer generally as it adds to the development of the city. The prosperity of a city depends upon its transportation. No transportation means no communication, which means no business. Air transportation will help the community in proportion to its use. Denver depends more than any other city on air transportation. It has obstacles of terrain which it is overcoming and it has a future of greatness in air transportation. If Denver becomes prosperous, its citizens will become prosperous and the lawyer will participate in the city's prosperity. Therefore, the lawyer will encourage air transportation so as to add to the general prosperity of the city.

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[36] 17 Comp. Gen. 1039. "Real Estate—Rights of Way—Rio Grande Canalization Project."

[37] All decisions, administrative rulings and articles extant to September, 1944, are cited herein.

The difficulties of air transportation are being overcome. Air transportation is more than one hundred times as safe now as it was at the conclusion of World War I. Eventually air transportation will be the safest and cheapest mode of transportation, and when it is safest and cheapest, it will be purchased.

The auto has developed much business for the lawyer, such as damage suits, insurance business, etc. Likewise, the air lines will develop business for the lawyers. They too will have contracts, damage suits, insurance business, and many other types of legal business requiring representation by lawyers. Air lines might take lawyers into executive positions. Terrell Drinkwater, a Denver lawyer, is now vice-president of one of the major air lines in the United States.

Airplanes to a great extent create their own business. Some people make a quick trip by plane when had they had to rely upon slower methods of transportation they could never make the trip. The airplane increases rather than cuts into the business of other carriers. It creates business because it saves time and the more time it saves the more time there is for business and thus the more business.

The World Fair of Aviation is scheduled to be held in July in Omaha, in connection with the National Aeronautics Association's first post-war convention. Many foreign nations have been invited to exhibit their latest equipment.

In response to a question as to what increased facilities Denver needs, Mr. Acker stated that there was a need for expansion of the Denver Municipal Airport and plans for an enlarged administration building have been completed. There is also need for more private flyer facilities. There will never be any necessity of increasing the size of the air field because the planes of the future will require less space for landings and take-offs. This will be due in part to the reverse pitch propeller and rocket assistance. Of course, the plans of the Denver airport will have to fit in with the national plans and needs. The time will come when every city will have a downtown air terminal. Denver will need several private fields adjacent to the residential sections, but these should not be so located as to cut down residential expansion. Denver needs a field for model planes and gliders.

In answer to a question regarding the prospects of Denver in national and international traffic, Mr. Acker stated that Denver would get none of the East-West transcontinental traffic. However, Denver is on the great circle route known as the Sunshine International Route from South America through Texas, Denver, Canada, Alaska, Russia and to China and Japan. This is a more feasible route to the Orient than going through California, as it reduces the distance 400 miles. Denver has been declared an air gateway by the Civil Aeronautics Board. Travel to

the Orient through the southwestern part of the United States would go through Denver.

Mr. Acker also was asked how air transportation would affect freight transportation and he replied that mass production of the airplane and mass consumption of air transportation will reduce costs. The time will come when heavy freight can be shipped by air economically. The greatest possibilities are in the shipment of tropical fruit from South America. It can be shipped in here and consumed within a few hours, thereby reducing costs of packing and loss of spoilage.

Recent Judicial Modification of Habitual Criminal Act

BY WILLIAM E. DOYLE*

A few weeks ago the Colorado Supreme Court had occasion to reverse a case in which the defendant had been charged and convicted of violating the habitual criminal statute. Although the act has been changed[1] since the conviction of the defendant in that case, it is believed that the decision is of sufficient interest to warrant brief comment in view of the substantial similarity between the old law and the new one and in view of some of the other implications of this recent Supreme Court pronouncement. The decision referred to is *O'Day v. People,* No. 15638, Public Ledger, Jan. 19, 1946.

The information charged the defendant, William O'Day, with the offense of aggravated robbery. The second and third counts of the information charged prior convictions under the burglary statutes of California and Missouri. Upon being arraigned, the defendant admitted that he was the identical person who had been convicted of burglary in California and Missouri. Such an admission is equivalent to a plea of guilty under the habitual criminal statute.[2] The remaining issue, i. e., whether the defendant was guilty of the immediate offense, was submitted to a jury. The verdict of the jury was guilty of the offense of aggravated robbery. Pursuant to this verdict and the previous pleas of guilty, the trial court sentenced the defendant to life imprisonment.

A cursory examination of the history of the habitual criminal statute indicates that cases which have been filed under this act have not

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[1]Chapter 114, Session Laws of Colo.. 1945.

[2]Section 554, Chapter 48, 1935 C. S. A. provides in part as follows:

"Whereupon the court in which such last conviction was had shall cause the said person, * * * to be brought before it and shall inform him of the allegations contained in such information and of his rights to be tried as to the truth thereof according to law, and shall require such offender to say whether he is the same person as charged in such information or not. If he says he is not the same person or remains silent, the court shall enter a plea of not guilty."

fared too well in our Supreme Court. The act, which was passed in 1929,[3] provides generally for aggravated punishment for second and subsequent offenders. In the case of a second offense, the term is not less than one-third the longest term prescribed upon a first conviction. For a third conviction, the term of imprisonment is not less than the longest term nor more than three times the longest term prescribed upon a first conviction.[4] One who has been three times convicted previously must be sentenced to life imprisonment.

In the case of *Smalley v. People*, 96 Colo. 361, 43 P. (2d) 385, the court in construing this act laid down the requirement that where the district attorney at the time of filing the information knows of prior convictions, he must allege them or waive his right to proceed thereafter under the habitual criminal statute.

More recently the court had occasion to reverse another case in which the defendant had been charged with being an habitual criminal. This was *Wolf v. People*, 111 Colo. 46, 137 P. (2d) 693, 695. Here the trial court had ordered two separate trials, one on the immediate substantive offense and the second to determine whether the defendant had committed previous felonies. The ruling on appeal was that no legal basis existed for the separate trials—that the trial court should have proceeded to try the entire case as one.[5]

The original act and the one under consideration have now been changed in an important particular. Formerly, it took into account only a limited number of more serious felonies. The present act is much broader. It declares that persons previously convicted of *any* felony shall be tried and prosecuted under the habitual criminal statute.[6]

In the principal case the court expressed doubt as to whether the trial judge had sentenced the defendant pursuant to the provisions of the aggravated robbery statute or in accordance with the habitual criminal statute.

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[3]L. '29, p. 309, Secs. 1-5, Secs. 551-555, Ch. 48, 1935 C. S. A.

[4]In the principal case, although the Supreme Court expressed doubt as to whether the accused had been sentenced under the robbery statute or under the habitual criminal statute, it would appear that the trial court proceeded under the latter act. Undoubtedly, the trial court felt that it was required to sentence the accused to life in prison, since that is the maximum sentence for the offense of aggravated robbery.

[5]It would seem that the statute does in fact contemplate separate trials. It reads in pertinent part as follows (Sec. 554, Ch. 48, 1935 C. S. A.):

> "If at any time *after* conviction and either before or after sentence it shall appear that a person convicted of a felony has previously been convicted of a crime or crimes as set forth in any of the three foregoing sections, it shall be the duty of the district attorney * * * to file an information in such case accusing the said person of such previous conviction or convictions." (Emphasis supplied.)

Thus it would appear that the legislature had intended that action under the habitual criminal statute should be taken only after conviction of the immediate substantive offense.

[6]Sec. 1, Ch. 114, L. '45.

"We have examined the sentence and there is nothing therein which indicates whether the sentence imposed was pronounced under the provisions of section 551, 552, and 554, supra, or whether under the provisions of section 84, Chapter 48, '35 C. S. A."

If the sentence was pronounced under Section 84, Ch. 48, 1935 C. S. A., i. e., the robbery statute, it was held to be defective because it did not include both a minimum and a maximum sentence. The court construed the words "not less than two years, or for life," which words are contained in the aggravated robbery statute to mean not less than two years nor more than life and thus to be subject to Section 545, Ch. 48, 1935 C. S. A., which provision requires that the court pronounce both a minimum and a maximum sentence.[7]

"It is a general rule of construction that criminal statutes shall be strictly construed, and in accordance therewith, we hold that the penalty authorized under section 84, supra, is for a term of two years to life. The section does not authorize the imposition of a specific life sentence and if the trial court construed it as authorizing the imposition of such a sentence, it committed error."[8]

The second and final phase of the decision involves a construction of the so-called habitual criminal statute. It was held that if the court sentenced the defendant pursuant to Section 552, i. e., the habitual criminal statute, it erred in not ascertaining whether the prior convictions were offenses of the grade of felony. It was said:

"If the court was of the opinion that it might impose a life sentence under section 552, supra, there likewise was error committed for there is no such proof of former convictions as would authorize this action. It should be noted that the defendant here admitted his identity. We believe it was the positive duty of the court to make inquiry as to the offenses for which defendant had theretofore been convicted. We do not take judicial notice of the laws or statutes of other states; they must be proved in the same manner as other facts in the case."

The sum and substance of the decision is found in the above language. In other words, it will no longer be possible for the trial court simply to ascertain whether the accused is the same person who was tried and convicted of the prior offenses. In the future the district attorney will have to prove that the prior convictions were in fact felonies

[7]By its terms this section does not apply to a life sentence. It provides in part: "When a convict is sentenced to the state penitentiary, *otherwise than for life*, for an offense or crime committed after the passage of this subdivision * * *" (Emphasis supplied.)

[8]From a reading of the entire case, it would seem to be amply clear that the trial court sentenced the defendant under the habitual criminal statute and not the robbery statute. It is suggested, therefore, that this phase of the decision is *obiter*.

regardless of whether the accused has attempted to plead guilty. This, it is believed, is a fair requirement because crimes vary from state to state even though their designations are the same. Furthermore, the accused is not always in a position to know whether his act constitutes a felony under the laws of the state in which he is presently being tried. In support of this assertion it is pointed out that even when an accused pleads guilty, it is customary for the court to require the district attorney to produce evidence establishing the elements of the offense charged. In fact, there is a statute in Colorado which requires the court to examine witnesses as to the aggravation and mitigation of the offense.[9] A consequence of this phase of the decision will be hesitancy on the part of trial courts to proceed under the habitual criminal act unless the proof of former convictions is clear and convincing.

One other result of this decision is that in the future a straight life sentence may not be imposed. It will be necessary in every case to pronounce a minimum and maximum limitation on the term. Presumably a sentence of ninety years to life would satisfy this requirement. It would seem that this aspect of the decision might be of consequence to those persons who are now serving life sentences for aggravated robbery, forcible rape or second degree murder. For these convicts, the decision could provide a key to the door of the penitentiary. It is not possible to forecast a decision on the question of whether such a sentence is void or voidable, and whether such a person can be re-sentenced or whether the trial court will have lost jurisdiction to correct a defective sentence. In any event, these are questions which will certainly be posed to courts in the near future, and until the matter is settled, an epidemic of petitions and motions is anticipated.

Perhaps more noteworthy than either of the above comments is the policy of our Supreme Court which is to be inferred from this and the prior decisions cited hereinabove, to scrutinize carefully all prosecutions under the habitual criminal statute. This, it is suggested, is a praiseworthy approach to the problem for the reason that the statute is a harsh one. It robs the trial judge of all discretion in imposing sentence. The legislature usurps the sentencing function, and it does so not on the basis of the particular facts, but purely on the record of former convictions. Granted that there ought to be statutory provision for increased punishment for habitual offenders, the power to declare the minimum and maximum sentences should remain in the trial judge. It is he and not the legislature who is in a position to evaluate the facts and to reach a just conclusion.

A further defect in the law is apparent. As now written it makes no distinction between a vicious gangster and a casual offender, a so-called constitutional psychopath. Therefore, it is now possible for a

[9]Sec. 482, Ch. 48, 1935 C. S. A.

district attorney to adopt the attitude that all third and fourth offenders should be prosecuted as habitual criminals. Such a practice could result in great injustice where, as we have demonstrated, the legislature has previously pronounced sentence, leaving the trial judge powerless in the matter.

How can these conditions be remedied? First, it is suggested that the act be amended so that the trial judge will have a broad discretion in pronouncing sentence. Secondly, the law should not include all felonies, but should be limited to particular selected ones, such as kidnapping, robbery, rape, mayhem, etc.

It has been suggested above that the harshness of this statute moves the court to consider strictly cases arising under it. If the trial judge were allowed more discretion, perhaps there would be fewer reversals.

Newly Admitted Members of the Bar

William V. Webb, admitted Feb. 1946 on motion. A.B. Univ. of Denver, LL.B. Univ. of Texas 1933, member Beta Theta Pi and Phi Delta Phi. Was engaged in general practice of law in Dallas, Texas, 1933-1940. Was in army 1940-1946, leaving it as lt. col. in the Inspector General's Dept. Was last with headquarters of Tenth Army in Okinawa. Mr. Webb is officing at 828 Symes Bldg., Denver, and is particularly interested in the fields of oil and gas and corporations.

James F. Price, admitted Feb. 1946 on motion. B.S. Kansas State College 1927, LL.B. Stanford 1930, LL.M. Stanford 1937. Member Delta Theta Phi. Has had experience as trust officer, member of security and brokerage firm and New York Stock Exchange. Is now dean of the schools of Law and Commerce, University of Denver, 211 15th St., Denver. Is particularly interested in the field of public law, particularly labor law.

Gordon A. Nicholson, admitted Jan. 1946 on motion. Studied at University of Utah, LL.B. George Washington University 1935. Member of Sigma Pi. Was on the law review staff, and has the Order of the Coif. Served as ten years as special agent and special agent in charge, FBI. He is with the D. & R. G. W., 1531 Stout St., Denver. He is particularly interested in the fields of transportation, personal injury, criminal and taxation law.

Harold Edward Hafer, admitted Feb. 1946 on motion. Studied at Colorado Univ. 1929-1932, B.S. Univ. of Oklahoma 1933, LL.B. Univ. of Oklahoma 1936. Member of Sigma Pi. Admitted to Oklahoma bar in 1936. General practice in Chickasha, Oklahoma, 1936-1942. Asst. Prosecuting Attorney, Grady County, 1939-1942. FBI

1942-1946. Is now residing in Denver, but expects to open offices in the Wilson Bldg., Fort Collins, April 1946. Is particularly interested in real estate and probate fields.

Woodruff B. Cram, admitted Feb. 1946 on motion. LL.B. Detroit College of Law 1928. Admitted to Michigan bar 1929. Was in Highland Park Trust Co. 1928-1931. Practiced in own office in Detroit from 1932 to 1945. Is now Associate District Price Attorney, OPA. Expects to open own office in Denver at conclusion of government program. Interested in fields of wills, estates, corporations, real estate, negligence and labor law.

Earl A. Wolvington, admitted on examination Feb. 1946. A.B. Univ. of Nebraska 1939, LL.B. Univ. of Nebraska 1940. Admitted to Nebraska bar 1940. Member Phi Alpha Delta. Served in army from 1941 to Jan. 1946. Was overseas in India and Africa for 34 months. Served as trial judge advocate or defense counsel on various courts martial in Tunis and Casablanca. Was commanding officer of a quartermaster truck company with rank of captain. Is in general practice in association with Raymond M. Sandhouse, Foote Bldg., Sterling.

William D. Wright, III, admitted on examination Feb. 1946. A.B. magna cum laude Univ. of Colorado 1938, LL.B. Yale 1942. Member of Beta Theta Pi and Phi Beta Kappa. Played varsity baseball. Special agent FBI March 1942 to Dec. 1945. Is practicing law with father, W. D. Wright, Jr., 722 Symes Bldg., Denver. Interested in trusts, business law, bills and notes.

Hunter D. Hardeman, Jr., admitted on examination Feb. 1946. B.A. Texas A. & M. 1943, Univ. of Texas, LL.B. Univ. of Colorado 1945. Member Pi Kappa Alpha. Was on law review staff and vice-president student bar association at Colorado Univ. Is a partner with Frank H. Hall in the firm of Hall and Hardeman, First National Bank Bldg., Trinidad. Interested in real property law and negotiable instruments.

James J. Johnston, admitted on examination Feb. 1946. B.A. Univ. of Iowa 1944, J.D. Univ. of Iowa 1945. Member of Phi Delta Theta and Phi Delta Phi. Was president of both of these fraternities and also of the Iowa Memorial Union Board. He is not definitely located. Is interested in the fields of corporation and labor law and would prefer to enter general practice with special emphasis on these fields.

H. Harold Calkins, admitted Feb. 1946 on examination. A.B. Cornell College 1938, LL.B. Northwestern 1940. Member Phi Delta Phi, Phi Beta Kappa. On Illinois Law Review staff. Was in the FBI five and one-half years. Associated with Phelps and Phelps and Benjamin E. Sweet, E. & C. Bldg., Denver.

Virgil Albert Lininger, admitted on examination Feb. 1946. LL.B. Westminster Law School 1942. Was Assistant to the Manager,

Hawaiian Dredging Co., Ltd., Honolulu. Now located at 1405 Glenarm St., Denver.

Minoru Yasui, admitted on examination Jan. 1946. B.A. Univ. of Oregon 1937, LL.B. Univ. of Oregon 1939, studied at Denver Univ. 1945. Practiced in Oregon 1939-1942. Member Phi Beta Kappa. Now in general practice in association with Toshio Ando, 615 E. & C. Bldg., Denver.

Charles F. Cory, admitted under special soldier rule Feb. 1946. B.S. in Com. Univ. of Denver 1938, LL.B. Washburn 1941. Vice-president of law school 1940. Admitted Kansas bar 1941. Was professional musician. Served in army 1941-1946. Was major. Served on Third Army Staff in invasion of France and in Luxembourg and Germany. Is now Assistant Attorney General of Colorado. Is interested in taxation, wills and estates, and real property.

Lon J. Putnam, admitted under special soldier rule Feb. 1946. B.A. Baylor 1938, LL.B. Univ. of Texas 1941. Entered army immediately after passing Texas bar examination in June 1941. Was discharged as a major Dec. 1945. Is not at present definitely located. Would like to associate with established firm for experience.

John Edward Morrison, admitted under special soldier rule 1945. Univ. of Denver 1934-1937, LL.B. Westminster Law School 1940. Member Alpha Kappa Psi. Has had three years accounting work, two years Assistant Credit Manager Crane-O'Fallon Co., 1631 15th St., Denver, where he is at present. In Sept. 1940 enlisted U. S. N. R. Commissioned ensign 1941. Reported for active duty Sept. 1941. Was in Hawaiian area at time of Pearl Harbor attack. Served four and one-half years in navy (three and one-half years overseas), on the Chicago, Astoria, Yorktown, Enterprise, Saratoga, Bunker Hill, Essex and Pittsburgh. Was on the Yorktown at the Battle of Midway when the ship was abandoned. Is interested in the fields of corporation and business law.

Benjamin Franklin Stapleton, Jr., admitted under special soldier rule Dec. 1945. B.A. (Bus.) Univ. of Colorado 1939, LL.B. Yale 1942. Member Chi Psi, Phi Delta Phi, Corbey Court. Served 45 months in navy, most recently as navigator aboard the U. S. S. Shea in the Pacific theater until it was hit by suicide plane at Okinawa. Interested in estates and corporation law. Associated with Ireland & Ireland, Midland Savings Bldg., Denver.

Hyman A. Coggan, admitted under special soldier rule Feb. 1946. B.A. Univ. of Denver 1940, LL.B. Univ. of Denver 1942. Member Phi Sigma Delta, Sigma Phi Alpha, Skull and Bones. Worked way through school and supported family by operating barber and beauty shop. Would like to associate with established firm. Offices at 703 Security Bldg., Denver.

W. Russel Eddy, admitted under special soldier rule Dec. 1945. A.B. Univ. of Denver 1940, LL.B. Univ. of Denver 1942, Cornell University, certificate of completion 1943 (personnel psychology, army specialized training program). Member Lambda Chi Alpha. In college participated in band, glee club and track. Is registered pharmacist in Colorado with nine years experience. Was personnel consultant with army two years. Is now in general practice associated with Fred Harding, 624 E. & C. Bldg., Denver.

Donald Carl McKinley, admitted on examination Feb. 1946. A.B. Dartmouth 1937, J.D. University of Chicago 1940. Member Phi Gamma Delta and Casque and Gauntlet. College activities included varsity basketball, Barrett Cup, Palaeopitus. He was admitted to Illinois Bar in 1940. Served four years U.S.N.R. on sub chasers and destroyers and was released Jan. 7, 1945 as lt. Is interested in real estate, labor law and trial practice. He is associated with Means & Isbill, 902 Midland Savings Bldg., Denver.

Our Returning Lawyer-Veterans

Donald S. Stubbs, lt. (j.g.), U. S. N. R., served from Aug. 1944 to March 1946 in the American, European-African, and Asiatic-Pacific theaters. He has returned to practice with the firm of Lewis and Grant, 1030 First National Bank Bldg., Denver.

Teller Ammons, lt. col., C. M. P., A. U. S., served from April 1942 to Dec. 1945 in the U. S. and Pacific. He was attached to the Marines for overseas duty, and received the Legion of Merit. He has returned to practice in his office at 608 Midland Savings Bldg., Denver.

Frederick T. Henry, major, Judge Advocate General's department, served from March 1942 to March 1946 in the United States, England, France, Germany and Belgium. He has returned to practice with offices at 218 Mining Exchange Bldg., Colorado Springs.

Jerome R. Strickland, lt. col., Army Air Forces, served from Jan. 1941 to March 1946 in the U. S., France and Austria. In the U. S. he served with the training command, and in France and Austria with a B-26 group. He received the air medal with two clusters, three campaign stars, and the ETO ribbon. He has returned to practice with the firm of Strickland and Strickland, with offices at 425 Denver National Bank Bldg., Denver.

Roy E. Montgomery, sk 2/c, U. S. N. R., served from March 1944 to Nov. 1945 in the Pacific, on duty aboard the U. S. S. Noble, A. P. A. 218. He has returned to practice with offices at 752 Gas and Electric Bldg., Denver.

Charles F. Stewart, capt., J. A. G. D., served from May 1942 to Jan. 1946 in the North African Middle Eastern theater. He received the Soldier's Medal. He has now returned to practice with his firm of Porter, Stewart and Carroll at Gunnison. Mr. Stewart is a former president of the Gunnison Chamber of Commerce and is now a candidate for mayor in the spring election.

William Grant, lt. com., U. S. N. R., served from June 1942 to Nov. 1945 in the Pacific theater. He has returned to practice with the firm of Grant, Shafroth and Toll, with offices in the Equitable Bldg., Denver.

Charles H. Haines, Jr., lt. (j.g.), Supply Corps, U. S. N. R., served from Nov. 1943 to Feb. 1946 in the American and Pacific-Asiatic theaters, attached to the Fleet Supply Office Com. Serv. Pac. He has returned to practice with the firm of Grant, Shafroth and Toll, 730 Equitable Bldg., Denver.

Fred N. Holland, major, Adjutant General's department, served from Feb. 1943 to June 1946 in the Office of Dependency Benefits at Newark, N. J. While on duty with the Office of Dependency Benefits he was officer in charge of the Fraud Section of the Field Investigations Branch. Major Holland attended the University of Idaho and graduated from the University of Denver School of Law in 1924. Before entering service he was a member of the firm of Berman & Holland. He is now attorney in the branch office for area 13 of the Veterans Administration in Denver.

John M. Evans, lt. comdr., Navy, served from June 1942 to Jan. 1946 in the American theater. He is now in the office of the Attorney General, State Capitol Bldg., Denver.

Mary C. Griffith, lt. (j. g.), U. S. N. R., served from Sept. 1943 to March 1946, during which period she was stationed in the Bureau of Naval Personnel, Washington, D. C., in the Welfare Division, Family Allowance Section. She was officer in charge of reconsideration, sub unit for class B (parents, brothers, and sisters), family allowances and also served in sub unit class A (wives and children) family allowances. Before entering the service she was attorney for Kershaw, Swinerton & Wahlburg, general contractors for the Rocky Mountain Arsenal. She will resume the practice of law with her brothers, John L. Griffith, clerk of the Denver County Court, and Capt. James E. Griffith, now with the A. M. G. stationed at Regenburg, Germany, under the firm name Griffith & Griffith, with offices at 701 Midland Savings Bldg.

Charles Elwood Bradley, seaman 1/c, Navy, served from March 1945 to March 1946 in the U. S. Naval Ammunition & Net Depot, Seal Beach, Calif. During this period he was court martial yeoman. He has returned to practice in his own office at Steamboat Springs where

he practiced for six years prior to entering the service. He was admitted to the Colorado bar in March 1939 after graduating from the University of Colorado. He was candidate for district attorney of the 14th Judicial District in 1944.

Personals

Charles Rosenbaum, Denver, has been elected president of the Allied Jewish Council of Denver. The council is the local fund-raising organization for charity and relief among associated Jewish organizations.

William E. Doyle, Denver, recently discharged from the army as a second lieutenant, and a former deputy district attorney, has been appointed registrar of Westminster Law School to succeed John E. Nelson, who has been registrar for twenty years. Mr. Nelson has been appointed registrar emeritus.

Comm. Bentley M. McMullin, USNR, Denver, legal officer for the 12th Naval District, San Francisco, has been assigned to duty in Tokyo to participate in the prosecution of Japanese war criminals. This will take about six months, after which Comm. McMullin expects to return to practice in Denver. Comm. McMullin was assigned to duty in the Judge Advocate General's Office in 1941 and saw duty during the North African invasion. He has served in the United States, New Orleans, New York ,Washington and San Francisco, in various legal capacities.

Vernon V. Ketring and Alex B. Holland have formed a partnership and are practicing under the name Ketring and Holland, with offices at 1019 Midland Savings Bldg., Denver.

T. Raber Taylor has opened his own office for the practice of law at 404 First National Bank Bldg., Denver.

Herman W. Seaman and Conrad L. Ball have formed a partnership and are practicing under the firm name of Seaman & Ball, with offices at 204 First National Bank Bldg., Loveland.

The firm of Hindry, Friedman & Brewster has been dissolved. Guy K. Brewster is officing at 1011 University Bldg., Denver, and Hayes R. Hindry at 429 University Bldg., Denver.

Kenaz Huffman, Sherman Sutliff and Ranger Rogers have formed the firm of Huffman, Sutliff & Rogers, with offices at 411 E. & C. Bldg., Denver. This firm succeeds the 25-year-old firm of Yeaman, Gove & Huffman.

Joseph E. Newman has resigned as assistant U. S. District Attorney to resume private practice in Denver. He will be succeeded by Joseph N. Lilly, former assistant U. S. District Attorney, who has recently been discharged from the army.

Claude W. Blake, state senator from Denver, has been elected president of the Colorado Children's Aid Society and the City Temple Institutional Society.

Lt. James J. Patterson, Denver, will act as one of three defense attorneys in the trial of four Japanese accused of cruel and brutal offenses against American prisoners in Yokohama. Lt. Patterson is a former assistant Attorney General of Colorado.

Donald Lorenz, formerly associated with Schaetzel and Knight in Denver, has opened his own office for the practice of law in Steamboat Springs and Oak Creek.

Paul A. Hentzell, Denver, has resigned as assistant city attorney to devote his entire time to his own practice. Mr. Hentzell was prosecutor in police court for several months, and has recently handled city appeal cases to the county court.

Philip B. Gilliam, juvenile judge of Denver, has been elected vice-president of the west central area council of the Y. M. C. A. The position places him on the policy board of forty Y. M. C. A. groups in a seven state area including Colorado.

Shields Mason, recently returned from service, has opened his own office for the practice of law at 450 Equitable Bldg., Denver, phone TAbor 2977.

Henry Stark, formerly of Denver and recently returned from service, has associated with James B. Garrison in Cortez.

Donald D. Keim, Denver, manager of the Colorado State Chamber of Commerce, has been elected president of the Denver Rotary Club.

Worth Allen, Denver, has been elected treasurer of the Colorado Tuberculosis Association.

Ralph L. Carr, president of the Denver Bar Association, has been appointed as people's interest director of the Federal Home Loan Bank of Topeka.

Col. Charles C. Young, Denver, has been appointed Judge Advocate for the 9th Service Command. Col. Young entered the army in August, 1940, and was in charge of the Manila court martial of General Yamashita, and has recently returned to the United States after 30 months overseas.

Edward C. Day has been appointed director of the Denver rent area, over the rent areas administered from the Denver rent offices. He has recently returned to the OPA after serving in the navy.

John O. Rames, Denver, recently returned from service, has been appointed chief of adjudication for disability insurance claims in the Veterans Administration, branch 13 office.

District Judge William A. Black, Denver, was re-elected president of the Old Timers Baseball Association of Colorado to serve for the fourth consecutive year.

Admitted to a Higher Court

James A. Marsh, prominent Denver attorney and political figure, died recently in his home in Denver from a heart attack. Although not in the best of health during recent weeks, Mr. Marsh had been up and about until shortly before his death. He came to Denver in 1909 and was named city attorney in 1915, which position he held until 1923. After serving as Democratic state chairman he was elected Democratic national committeeman in 1934, which position he held until his death. In 1926 he was elected president of the Denver Bar Association.

Dudley W. Strickland, Denver, died at the age of 74 in the hospital after a long illness. He came to Colorado in 1898. He graduated from Williams College and Denver University School of Law. He was born in Cincinnati and spent much of his boyhood in Aspen. He was a member of the Loyal Legion and the Mile High Club. He was associated in the law practice with his two sons, Jerome and Dudley, Jr., both of whom have recently returned to practice after service in the armed forces.

Benjamin R. Kobey died at the age of 71 after an illness of several weeks. Born in England, he came to Colorado in 1887 and graduated from the University of Colorado in 1898. He practiced law in Aspen for a number of years.

Walter R. Crose, practicing attorney in Montrose, died at Wilmette, Illinois, while there on a visit. Mr. Crose was formerly city attorney for Montrose and a deputy district attorney and at the time of his death was a member of the board of governors of the Colorado Bar Association.

New Members of Denver Bar Association

The following were admitted to membership in the Denver Bar Association at the March 4, 1946, meeting:

H. Harold Calkins
James B. Day
Vance R. Dittman, Jr.
Ben Bozeman
Leonard M. Crowley

The following were admitted to membership at the April 1, 1946, meeting:

Hyman A. Coggan
Ralph H. Coyte
Woodruff B. Cram
Wilbur F. Denious, Jr.
John M. Evans
Leon Harvell
James F. Price
J. Nelson Truitt

Denver Bar Association Nominations

The Nominating Committee of the Denver Bar Association, consisting of Robert E. More, chairman, Floyd F. Walpole, Percy S. Morris, Richard Tull and Ernest B. Fowler, has made the following nominations for the association year beginning July 1, 1946:

For President ..... John E. Gorsuch
For First Vice-President ..... Langdon H. Larwill
For Second Vice-President ..... Kenneth M. Wormwood
For Trustees (two to serve three years) ..... James Quigg Newton, Jr.
Samuel S. Ginsberg

The annual election will be held on May 6th.

New Denver Bar Association Committees

President Ralph L. Carr announces the appointment of two new committees of the Denver Bar Association. The committee to handle the problem of on-the-job training program for veterans taking training in law offices consists of:

Charles A. Baer, Chairman, Colorado National Bank, Denver 17
James F. Price, 211 15th St., Denver 2
John R. Turnquist, 931 14th St., Denver 2

The committee to study the economic condition of the bar, particularly with reference to minimum and suggested fee schedule, consists of:

Hugh B. Kellogg, Chairman, 808 E. & C. Bldg., Denver 2
Ira L. Quiat, 415 Symes Bldg., Denver 2
William R. Newcomb, 620 E. & C. Bldg., Denver 2
Gilbert L. McDonough, 414 Equitable Bldg., Denver 2
Stephens Park Kinney, 1004 Patterson Bldg., Denver 2

Vacation Schedules

For Denver District Court

The following are the vacation schedules for the Denver District Judges for the year 1946:

Civil Division

June 24th to July 6th, Judge Joseph J. Walsh.
July 8th to July 20th, Judge Henry S. Lindsley.
July 22nd to August 3rd, Judge William A. Black.
August 5th to August 17th, Judge Joseph A. Luxford.
August 19th to August 31st, Judge Charles C. Sackmann.

Criminal Division

June 10th to July 20th, Judge Joseph E. Cook.
July 22nd to August 31st, Judge Robert W. Steele.
